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SUPREME COURT, U. S.

No. 447.

Supreme Court of the United States

OCTOBER TERM, 1948

WHEELING STEEL CORPORATION,
Appellant,

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF OF APPELLEE

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Appellee.

BRIEF OF APPELLEE

OPINIONS BELOW

The opinion delivered by the Supreme Court of Ohio in this case (R. 16) is reported officially in Volume 150, Ohio State Reports, beginning at page 229 (Ohio Bar, August 9, 1948). The opinion of the Board of Tax Appeals of Ohio (R. 67) is reported unofficially in Volume 72, Northeastern Reporter, Second Series, beginning at page 592. The opinion of the Tax Commissioner of Ohio (R. 57) is not reported.

STATEMENT OF JURISDICTION

This case was heard and decided by the Supreme Court of Ohio on an appeal from a final order of the Board of Tax Appeals of Ohio affirming assessment by the Tax Commissioner of Ohio[1] of an ad valorem tax in respect to certain credits consisting of certain notes and accounts receivable and prepaid insurance premiums (less certain notes and accounts payable) belonging to appellant, Wheeling Steel Corporation, a Delaware corporation having its principal office and its general business offices in West Virginia[2] and authorized to do business in Ohio, under the pertinent and applicable Ohio statutes as interpreted and applied by and under a long line of decisions of the Supreme Court of Ohio and under which such credits had a tax situs in Ohio as they were used in business and arose out of business in Ohio and were taxable in Ohio. At every stage of the proceedings, before the commissioner (R. 57), before the board (R. 35), and before the court (R. 15), appellant drew in question the validity of Sections 5328-1 and 5328-2[3] of the General Code of Ohio, which authorize the assessment, claiming that they, as interpreted and applied, are repugnant to the Constitution of the United States. The commissioner, after considering the question of the validity of the statutes, ruled that he was without authority to declare a statute unconstitutional and that the assessment was in every respect proper (R. 35, 58), and the board, after consideration, ruled that

1. C. Emory Glander, Tax Commissioner of Ohio, is the appellee and is referred to in this brief as the "Commissioner."

2. See Wheeling Steel Corp. vs. Fox, 298 U.S. 193.

3. These and other Ohio statutes mentioned in this brief appear in the appendix, beginning at page 47.

it had no right to declare a statute unconstitutional (R. 71); the Supreme Court of Ohio expressly decided in favor of their validity (R. 25). In its notice of appeal to the Supreme Court of Ohio (R. 8), the highest court of the state in which a decision could be had, appellant assigned as grounds for reversal of the decision of the Board of Tax Appeals that the statutes in question, as construed and applied by the commissioner and the board, burden and obstruct interstate commerce, deprive appellant of its property without due process of law and deny it the equal protection of the laws (R. 15). A determination of the constitutional questions thus raised by appellant was necessary to the decision of the case and the Ohio Supreme Court considered these questions and decided that the statutes are valid and are not repugnant to the Constitution of the United States (R. 25).

The judgment of that court was entered on August 4, 1948, and became final on October 6, 1948, upon the overruling of an application for rehearing filed by appellant on August 17, 1948 (R. 7). An appeal to this court was allowed by Honorable Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, on November 1, 1948 (R. 3).

Jurisdiction of this court was invoked by appellant under favor of Title 28, United States Code, Section 1257 (Pub. L. No. 773, 80th Cong., 2d Sess.).

STATEMENT OF THE CASE

The Legal Issues

The question is, may the state of Ohio impose against appellant, a Delaware corporation, authorized to do business within its borders, an ad valorem tax of three mills on the dollar in respect of the value of credits consisting of the sum of notes and accounts receivable due on demand or within one year from the date of inception and prepaid insurance premiums less the sum of notes and accounts payable, due on demand or within one year of the date of inception, all pertaining to appellant's business in Ohio,

(a) when said notes and accounts receivable arose from the acceptance at its general business offices in Wheeling, West Virginia, of orders for the sale of steel and steel products taken or received by and at appellant's various sales offices in Ohio and elsewhere and such orders were sent to appellant's manufacturing plants in Ohio where they were filled, some from a stock of goods manufactured at appellant's plants in Ohio and on hand in its said plants in Ohio and the rest from goods after they were manufactured at appellant's plants in Ohio, and

(b) when such notes and accounts receivable were payable and paid at appellant's general business offices in Wheeling, West Virginia, and

(c) when so paid the avails thereof were used for the general purposes of appellant's business, including payment of the expenditures and expenses of appellant's said Ohio plants, and

(d) when the general books and accounting records and the notes and other documents evidencing said notes

and accounts receivable were at all times kept in Wheeling, West Virginia, and were under the control of appellant's treasurer in that city, and

(e) when the only part of the proceeds of the collection of said notes and accounts receivable transferred to various bank accounts of appellant in Ohio was or were sums sufficient to make deposits to meet the payrolls of appellant's Ohio plants upon which Ohio bank accounts were drawn and issued by and at such Ohio plants checks to meet the payrolls of such plants, and

(f) when appellant had the greater part of its plants and equipment in Ohio and inventories and most of its tangible personal property in Ohio, and

(g) when the Ohio Supreme Court has held that these intangibles have a taxable situs in Ohio under Ohio statutes and under a line of decisions, of a number of years' standing, interpreting and applying such Ohio statutes.

Appellee contends

(1) that Ohio has jurisdiction to tax these intangibles as they were used in business and arose out of business in Ohio and, having such situs in Ohio, the imposition of the ad valorem tax at the rate of three mills on the dollar of value on such intangibles does not contravene the due process of the law clause of the Fourteenth Amendment,

(2) that the imposition and levy of the said ad valorem tax by Ohio on said intangibles, including receivables, is not void under the commerce clause as the intangibles have a business situs in Ohio and there is no evidence in the record as to what part, if any, thereof arose from the shipment of goods from Ohio to points outside of Ohio, and

(3) that the tax was imposed and assessed against appellant by the commissioner under Ohio statutes and, upon application and review, after hearing, the commissioner found such assessment valid and it was likewise so held by the Board of Tax Appeals of Ohio and by the Supreme Court of Ohio, and the Ohio statutes under which such levy and assessment were made have been interpreted in a number of decisions by the Supreme Court of Ohio over a period of years and the Supreme Court of Ohio in such decisions has been consistent and uniform in its interpretation of such statutes, and the application thereof as against appellant has not been capricious or arbitrary and appellant has not been singled out for assessment because it is a foreign corporation and the Ohio statutes have been applied uniformly to business ventures whether incorporated under the laws of the state of Ohio or elsewhere, and further that the intangibles had a business situs and a tax situs in Ohio, and such Ohio statutes as interpreted and applied do not violate the equal protection clause of the Fourteenth Amendment.

THE FACTS.

The facts were stipulated by counsel for the parties and the stipulation of facts is printed in the record at pages 60 to 65, both inclusive. The last paragraph thereof on page 65 reads as follows:

> "19. The transcript of the proceedings heretofore had before the Tax Commissioner of Ohio in this matter prior to the taking of the within appeal is incorporated herein by reference and made a part hereof."

In essence, the facts are that at the times mentioned in the stipulation, appellant was a Delaware corporation engaged in the business of manufacturing and selling steel and steel products (R. 60, 61). Its general offices were located in Wheeling, West Virginia, where all of its officers had their offices, meetings of its board of directors were held, and its general books and its general accounting records were kept (R. 61). Custody and control of its money, notes, securities and other valuable effects were exercised by the corporation's treasurer, whose office was in Wheeling, and all commercial and other accounts payable were paid by checks signed and issued at the Wheeling office (R. 61, 62); however, appellant's payrolls were made up and payroll checks were prepared and signed at all of appellant's plants and distributed to employees at the respective plants (R. 64). Balances were maintained in banks situated in the same localities as the plants sufficient for this purpose (R. 64). Appellant had eight manufacturing plants situated in Wheeling, Benwood, Follansbee and Beech Bottom, West Virginia, and in Steubenville, Yorkville, Martins Ferry and Portsmouth, Ohio (R. 62). Sales offices

were maintained by appellant in Atlanta, Georgia; Buffalo, New York; Cincinnati, Ohio; Detroit, Michigan; New Orleans, Louisiana; Philadelphia, Pennsylvania; San Francisco, California; Boston, Massachusetts; Chicago, Illinois; Dallas, Texas; Los Angeles, California; St. Louis, Missouri; Seattle, Washington; and New York City (R. 62). Appellant's subsidiary, Wheeling Corrugating Company, a West Virginia corporation, had a sales office at Columbus, Ohio, and its subsidiary, Consolidated Expanded Metal Companies, had a sales office in Cleveland, Ohio (R. 39, 40).

Orders for steel and steel products were solicited and received at the sales offices subject to acceptance or rejection at the Wheeling office and all orders received at the sales offices were forwarded to the Wheeling office for that purpose (R. 62, 63). Credit was extended to purchasers and the terms thereof fixed only at the Wheeling office where all promissory notes and accounts receivable resulting from sales were payable and where the records of the accounts and the notes themselves were kept (R. 61, 62). All accounts were billed from the Wheeling office and the sales offices had no powers or duties with respect to their collection. Proceeds of all receivables, when and as paid, were in the custody of appellant's treasurer at Wheeling and were there applied to the general purposes of the business (R. 64).

Appellant filed an inter-county consolidated personal property tax return (R. 37-56) for 1942 with the Department of Taxation of Ohio and listed in the return the machinery and equipment of its Ohio plants, its stocks of finished and semi-finished products, inventories of raw materials, supplies and other tangible personal property situated in Ohio on January 1, 1942 (R. 52). The only intangible property shown in the return (R. 43) as hav-

ing a situs in Ohio for purposes of taxation was certain deposits which were maintained in Ohio banks and which were used to meet the payrolls of the Ohio plants. All notes and accounts receivable were shown in the return (R. 43) as having a situs for taxation outside of Ohio. The return showed total book value of $68,968,402.33 for assets in Ohio and of $69,395,495.90 for assets outside of Ohio (R. 43). The return showed total book value of approximately $20,281,198.30 for items set forth under inventories in Ohio and of approximately $12,897,251.78 for items set forth under inventories outside of Ohio (R. 43). The return showed total book value of plants and equipment of approximately $48,373,427.63 in Ohio and of approximately $19,392,955.86 outside of Ohio (R. 43, 65). The return showed finished goods in the county or counties of manufacture in Ohio of $4,701,827.90 and stored in other counties in Ohio of $64,806.36 (R. 43, 65). The return showed that appellant and its subsidiaries had tangible personal property in thirteen counties in Ohio (R. 52).

Upon examination of appellant's records at the Wheeling office, the commissioner ordered the assessment for taxation in Ohio for the year 1942 of $2,093,452 out of a total of credits or net credits of $4,395,884 appearing on appellant's books on January 1, 1942 (R. 66, 63). The applicable tax rate was three mills on each dollar of value and the tax was $6,280.35 (R. 62, 63, 66). Included in said sum of $2,093,452 so taxed were notes and accounts receivable of $5,250,525 in Ohio out of a total of notes and accounts receivable of $10,817,361 and prepaid insurance of $225,328 in Ohio out of a total of prepaid insurance of $449,717 making a total of credits in Ohio of $5,475,853 from which were deducted $3,382,401 for payable and accrued items in Ohio (R. 62, 63, 66). The

notes and accounts receivable of $5,250,525 were so included for the specific reason that they "did result from the sale of property from a stock of goods maintained within this state" (Ohio) (R. 58), and the prepaid insurance of the value of $225,328 was so included for the reason that it represented prepaid premiums on insurance policies covering appellant's Ohio manufacturing plants (R. 62, 63).

Some of the receivables so assessed for property taxation in Ohio resulted from sales of products out of inventory in Ohio and delivered from Ohio; the greater part, however, resulted from sales of products manufactured in Ohio and delivered from Ohio after receipt of specific orders for them (R. 63). Some of the orders from which all of the receivables appellant eventuated were sent directly by the customers to the Wheeling office and were there accepted, but most of the orders were received at the various sales offices outside of West Virginia and were forwarded to Wheeling for acceptance (R. 63). After acceptance, the orders were then filled by the various plants of appellant in Ohio and elsewhere (R. 63), but the receivables arising or resulting from the orders so filled from merchandise at or manufactured at appellant's plants in Ohio and shipped to customers from said Ohio plants were the only receivables taxed in Ohio (R. 63).

All of said notes and accounts receivable so taxed in Ohio arose in the ordinary course of appellant's business of making sales of its products manufactured and on hand in Ohio or manufactured in Ohio (R. 63, 64) and all were due within one year (R. 64).

Property taxes on all of its receivables were paid by appellant to the state of West Virginia for the year 1942 (R. 64, 65).

THE OHIO STATUTES FOR THE TAXATION OF CREDITS AND ACCOUNTS RECEIVABLE

These statutes are printed in full in the appendix hereto (pp. 47-53, post). The relevant portions are as follows:

Section 5325-1, General Code of Ohio, is entitled: "Application of term 'used in business'; definition of word 'business'." The entire section reads as follows:

> "Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a non-resident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Section 5328-1, General Code of Ohio, is entitled: "Property to be entered on classification tax list and duplicate; exemption." It provided in part as follows:

> "* * * Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state

by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons, and non-withdrawable shares of stock of financial institutions located outside of this state, belonging to persons residing in this state, shall not be subject to taxation. * * *."

Section 5328-2, General Code of Ohio, is entitled: "Fixing situs of certain classes of property within or without this state; application to be reciprocal; effect of provisions held invalid." It provides in part as follows:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state.

"* * * * * * * * * * *

"The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and

under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a non-resident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof."

THE DECISIONS OF THE SUPREME COURT OF OHIO

It is conceded that the tax imposed in the instant case is assessed against appellant but is an ad valorem tax. In the case of *The Procter & Gamble Company, Appellee,* v. *Evatt, Tax Commissioner, Appellant,* 142 O. S. 369, decided by the Supreme Court of Ohio on December 22, 1943, the court in the syllabus of the case[4] said:

"Where an Ohio corporation has district offices outside of Ohio, in charge of district managers who perform all administrative duties connected with such offices, supervise the selling and delivery of merchandise and collect therefor, deposit in banks in the respective districts funds arising from accounts receivable resulting from such sales, have authority to accept drafts on such bank accounts, and can and do apply such deposits on the expenses and needs of the district offices, such accounts receivable and the avails thereof are used in business in other states and arise out of business conducted in such other states, for and on behalf of the Ohio owner, and are exempt from taxation in Ohio under Sections 5328-1, 5328-2 and 5325-1, General Code.

4. The syllabus of a decision of the Supreme Court of Ohio is prepared by the judge assigned to write the opinion, and receives the assent of a majority of the court. It is the rule, therefore, that the syllabus states the law with reference to the facts upon which it is predicated. The Baltimore & Ohio Railway Company v. Baillie, et al., 112 O.S. 567, 570.

> although checks covering the expenses of the district offices are forwarded to the company treasurer for his signature, and funds are withdrawn to Ohio after the expenses of the district offices have been satisfied."

The court in its opinion interpreted said Section 5325-1, General Code of Ohio, said section 5328-1, General Code of Ohio, and said Section 5328-2, General Code of Ohio, and in its opinion in the last paragraph of page 371 and in the first two paragraphs of page 372 said the following:

> "Each of the appellee's district offices outside of Ohio is in charge of a district manager who performs all administrative duties connected with the office. He supervises the selling and delivery of merchandise and makes collection therefor. He employs and discharges the employees connected with his office, and they are responsible to him.
>
> "The district offices deposit the checks and money received in payment on their accounts receivable, in bank accounts in the district office cities. District managers have authority to accept drafts on the local bank accounts comprising such deposits, and apply these deposits in payment of the needs of their offices, including wages and salaries of employees, rent, warehouse and trucking charges, etc. All expenses of the district offices are paid by the district managers or under their direction. Checks covering such expenses are drawn on the local banks where the district offices are located, and are then forwarded to Cincinnati to be signed by the company treasurer. After being signed, the checks are sent to the payees.
>
> "Deposits in the local banks are not withdrawn to Ohio until the expenses and needs of the district office are first satisfied."

In view of the facts that appellee was an Ohio corporation and that the ad valorem tax assessed by appellant

against appellee on accounts receivable resulting from the sale of property (1) by an agent having an office in another state, (2) delivered from a stock of goods maintained in a warehouse in such other state, (3) arising from business conducted in such other state, and (4) the avails thereof which are used in business in such other state, the facts meet all the tests in the exempting clauses of said sections, and the Ohio Supreme Court held that said accounts receivable were not taxable in Ohio, as under said sections such accounts receivable had a business situs outside of Ohio.

In the case of *The Ransom & Randolph Company, Appellant,* v. *Evatt, Tax Commissioner, Appellee*, 142 O. S. 398, decided by the Ohio Supreme Court on January 12, 1944, the court in the syllabus of the case said, among other things, the following:

> "1. Under section 5328-1, General Code, intangible property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons, is not subject to taxation in this state.
>
> "2. Section 5328-2, General Code, fixes the business situs of accounts receivable. When such receivables are used in business and result from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, such receivables shall be considered, for the purpose of taxation, to have arisen out of business transacted in a state other than that in which the owner thereof resides. The provisions of such section are to be reciprocally applied to the end that all accounts receivable having a business situs in this state shall be taxed in Ohio and no such property belonging to a resident of this state and having a business situs outside of this state shall be taxed in Ohio.
>
> "3. Under section 5325-1, General Code, the term 'used in business' or 'used' when employed in stat-

utes relating to taxation includes accounts receivable when they or the avails thereof are being applied, or are intended to be applied in the conduct of a business, whether in this state or elsewhere. The term 'business' includes all enterprises of whatever character conducted for gain, profit or income and extends to personal service occupations.

* * * * * * * * * * *

"5. The fact that a resident of Ohio withdraws the avails of accounts receivable, otherwise exempt from taxation, from banks in which out-of-state branches of his business have deposited them, and uses such avails in his business generally, including the payment of the expenses of such out-of-state branches, does not effect a change of the business situs of such accounts receivable for the purpose of taxation. Such accounts receivable are to be considered as having a business situs in the state where created, if they meet the test laid down in section 5328-2, General Code.

"6. The fact that deposits in other states are not withdrawable by an officer or agent having an office in such other state does not affect the business situs of accounts receivable arising from business done in such other states even though such deposits be the avails of such accounts receivable.

In the *Ransom* case, supra, appellant was an Ohio corporation with its office, manufacturing plant and principal place of business located at Toledo, Ohio, and had qualified to do business in the state of Indiana where it had two branch retail stores and also in the state of Michigan where it had four retail stores. The court in its opinion in the second paragraph on page 402 said:

"As found by the Board of Tax Appeals in its entry in the instant case: 'Inasmuch as the accounts and notes receivable here in question accrued to the company on the sale of its property by managing agents of the company having their several offices and places of business in certain designated

> cities in the states of Indiana and Michigan, and such property was sold from stocks of goods maintained by the company in its storerooms in the several cities of the other states herein referred to, it clearly appears that within the purview of sections 5328-1 and 5328-2, General Code, these receivables arose out of business transacted in states other than that in which the appellant as the owner of such receivables, resided.'"

In the *Ransom* case the commissioner had assessed the three-mill ad valorem tax on said accounts receivable resulting from such sales made by agents or employes having an office or store in another state and from a stock of goods maintained in such other state. The court held said accounts receivable are not taxable in Ohio as they had a business situs outside of Ohio. At page 408 in its opinion in the *Ransom* case, supra, the court said:

> "* * * The only statutory conditions for out-of-state situs account receivable are that they shall be used in business and shall result from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein (Section 5328-2, General Code). * * * However, we think that the accounts receivable in this case meet this test."

In the case of *The Haverfield Company, Appellant,* v. *Evatt, Tax Commissioner, Appellee,* 143 O. S. 58, decided by the Ohio Supreme Court on March 22, 1944, the Court in its syllabus said, among other things, the following:

> "1. Accounts receivable are 'used in business,' within the meaning of the statutes of Ohio relating to taxation, when they or the avails thereof are being applied or are intended to be applied in the conduct of a business, whether in this state or elsewhere.
>
> "* * * * * * * * * *"

"3. 'Accounts receivable' arising from business transacted in a state other than Ohio are 'used in business' within the provisions of section 5325-1, General Code, and therefore exempt from taxation in this state under the provisions of sections 5328-1 and 5328-2, General Code, where the avails of such accounts receivable are used partly in payment of the expenses of the operation of such out-of-state business, and the balances, if any, remitted to and used by the Ohio corporation in its regular course of business, whether in this state or elsewhere. (Ransom & Randolph Co. v. Evatt, Tax Commr., 142 Ohio St., 398, approved and followed.)

The Haverfield Company was an Ohio corporation with its principal place of business in Columbus, Ohio, engaged in selling millinery at retail, and conducted and operated retail millinery departments in department stores both inside of Ohio and outside of Ohio. The commissioner imposed the three-mill tax against the Haverfield Company on its accounts receivable resulting from the sale of property by agents having an office or retail space in a state outside of Ohio and from a stock of goods maintained in such state outside of Ohio. The court considered the above quoted sections and found that the accounts receivable were used in business and had a business situs outside of the state and consequently were not taxable in Ohio.

In the case of *C. F. Kettering, Inc., Appellant,* v. *Evatt, Tax Commissioner, Appellee,* 144 O. S. 419, decided by the Ohio Supreme Court on February 7, 1945, the court considered the above mentioned sections of the General Code of Ohio. The *Kettering* case, *supra*, involved an Ohio franchise tax assessment against a foreign (Delaware) corporation having its principal business office and place of business in Ohio and said corporation's business activities consisted principally of holding and own-

ing shares of stock and other investments, including negotiable instruments, bonds, debentures and obligations, and real estate and collecting and receiving the income therefrom. The court in the second paragraph of the syllabus said the following:

"2. Under the provisions of sections 5498, 5328-1 and 5328-2, General Code, as they are connected and related, a general bank deposit or account maintained in Ohio by a corporation organized under the laws of another state and used by it for the purposes of its business generally, within and without Ohio, may not be included in the base for the computation of the franchise tax to be collected from such foreign corporation, even though such deposit or account may fluctuate in amount and the funds therein are withdrawable by the Ohio officers or agents of the corporation."

In the cases of *National Cash Register Company, Appellant, v. Evatt, Tax Commissioner, Appellee,* 145 O. S. 597, decided by the Ohio Supreme Court on August 8, 1945, the court in the syllabus thereof said:

"1. In computing the franchise tax to be assessed against a corporation organized under the laws of another state but carrying on its principal activities in Ohio, accounts receivable, arising out of business transacted in this state on behalf of such corporation where the avails thereof are applied or intended to be applied in the conduct of its business either within or without this state, should be included in the base for the computation of such tax.

"2. Under the provisions of sections 5498, 5328-1 and 5328-2, General Code, general deposits of a foreign corporation, located in banks outside of Ohio, maintained and used by such corporation for purposes of its business generally, both within and without Ohio, should not be included in the base for the computation of the franchise tax to be assessed against such corporation, even though such deposits may fluctuate in amount and the funds therein are

withdrawable by Ohio officers and agents of such corporation. (C. F. Kettering, Inc., v. Evatt, Tax Commr., 144 Ohio St. 419, approved and followed.)"

The National Cash Register Company was a Maryland corporation with its manufacturing plant and executive and accounting offices located at Dayton, Ohio. The case involves, among other things, sales made outside of Ohio by sales offices outside of Ohio, which sales were filled from stocks of goods located outside of Ohio. The court considered the above mentioned sections of the General Code of Ohio and for Ohio franchise tax purposes held in substance that (1) accounts receivable resulting from the sale of property sold by an agent having an office in a state other than Ohio and from a stock of goods maintained in such other state are considered to have a business situs outside of the state of Ohio, and (2) accounts receivable resulting from a sale of property sold by an agent having an office in another state but filled from stocks of goods maintained in Ohio have a situs in Ohio for tax purposes. The court at page 603 in its opinion said inter alia:

"Appellant lays great stress upon section 5328-2, General Code, and the reciprocal provision thereof.

"Sections 5328-1 and 5328-2, General Code, are *in pari materia* and must be construed together.

"Section 5328-1, General Code, insofar as applicable here, provides:

"'* * * Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person * * * shall be subject to taxation * * *'

"It should be emphasized that that section provides for taxation property of a non-resident (foreign corporation). Accounts receivable used in and arising out of business transacted in Ohio on behalf of a foreign corporation are subject to taxation in this state."

In the case of *The American Rolling Mill Company, et al. Appellants*, v. *Evatt, Tax Commissioner, Appellee*, 147 O. S. 207, decided by the Ohio Supreme Court on December 11, 1946, the court considered said sections 5328-1 and 5328-2, General Code of Ohio, in a case involving certain bank deposits of an Ohio corporation maintained in Missouri and Oklahoma, and held that they were subject to taxation under said sections 5328-1 and 5328-2, General Code of Ohio.

In the opinion handed down by Judge Turner in the *Ransom* case, supra, at page 409 appears the following paragraph:

> "It is clear that it was the intention of the General Assembly that all property having a business situs in Ohio should be taxed in Ohio and that no property having a business situs outside of Ohio should be so taxed."

ARGUMENT.

Appellant's credits assessed for taxation in Ohio included the sum of all of appellant's notes and accounts receivable, due on demand or within one year from the date or dates of the inception thereof, resulting from sales and shipments from its plants in Ohio to its customers of products produced at appellant's Ohio manufacturing plants or of products from a stock of goods maintained by appellant at its said Ohio manufacturing plants and the values of the prepaid insurance policies in so far as such insurance policies covered its Ohio manufacturing plants over and above the sum of accounts payable due on demand or within one year from the date or dates of inception thereof. All of such accounts payable arose from appellant's business activities in Ohio and operations at its said Ohio manufacturing plants. Said receivables or the avails thereof were used in appellant's business in Ohio and elsewhere. The assessments were made under various sections of the Ohio General Code, but the most pertinent of such sections are 5325-1, 5328-1, 5328-2 and 5638-1.

(a) Sections 5328-1 and 5328-2 of the General Code of Ohio, as Construed and Applied in This Case, Are Valid Under the Due Process Clause of the Fourteenth Amendment.

These two sections are in pari materia and should be construed together. See *National Cash Register Company* v. *Evatt*, supra.

The tax is assessed against appellant and is an ad valorem property tax on the value of its credits in Ohio. The receivables included in the credits so assessed re-

sulted from orders for sale and delivery of its products received at appellant's offices in Wheeling, West Virginia, or at its various sales offices, at least one of which was situated in the state of Ohio, and transmitted by such sales offices to Wheeling, West Virginia, where they were accepted by appellant; then such orders so accepted were transmitted to appellant's Ohio plants for consummation of the contracts of sale and delivery of the products to the various persons placing the orders; and then such orders were filled from the stock of products maintained at appellant's Ohio manufacturing plants or were manufactured and delivered from the stock of goods so manufactured. The products were then shipped or delivered from its Ohio plants to appellant's customers and the sales completed. The contracts of sale were accepted by appellant outside of Ohio but the sales were consummated by appellant within Ohio. The records of the accounts receivable were kept at appellant's Wheeling offices and the receivables were payable there and when the funds were received they were used for general business purposes of the corporation, including the payment of the expenditures and the expense of appellant's Ohio manufacturing plants. Appellant transferred sufficient of such funds to its Ohio bank accounts maintained for purpose of meeting its payrolls at its Ohio manufacturing plants and checks were drawn and issued at its Ohio manufacturing plants and delivered for the payment of such payrolls. Appellant's inventories in Ohio on January 1, 1942, amounted to approximately $20,281,198.30, whereas its inventories outside of Ohio on said date amounted to approximately $12,897,251.78. The book value of appellant's manufacturing plants and equipment in Ohio amounted to approximately $48,373,427.63

and the book value of its plants and equipment outside of Ohio amounted to approximately $19,392,955.86. Appellant's Ohio tax return showed total book value of $68,968,402 for assets in Ohio and of $69,395,495 for assets outside of Ohio. If appellant's receivables of $5,250,525 arising from such business transacted in Ohio had been included in said book value of assets in Ohio, the appellant's total of its assets in Ohio would have exceeded the total of its assets outside of Ohio.

Appellant paid ad valorem taxes on its tangible personal property in Ohio. Appellant was authorized to transact business in Ohio and paid an annual franchise fee for so doing. Appellant was subject to taxation in Ohio. Appellant's said receivables totaling $5,475,853 had a business situs in Ohio and were subject to taxation in Ohio and its prepaid insurance premiums of $225,328 on policies of insurance covering its Ohio plants had a business situs in Ohio and were subject to taxation therein.

The appellant in its brief relies upon the decision of this court in the case of *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193, "a case involving the identical factual set-up." In that case this court in its opinion said the following relative to Ohio taxes on receivables of Wheeling Steel Corporation (pp. 207 and 208):

> "The total amount of the corporation's accounts and notes receivable on January 1, 1933, was $2,234,743.11. Of this amount, $374,410.42 were receivables for goods sold and manufactured in, and shipped from, West Virginia to resident and nonresident purchasers. It appeared that the corporation had been assessed in Ohio, as of January 1, 1933, on accounts and notes receivable amounting to $250,133.42.

"The Supreme Court of Appeals of West Virginia held that there had been 'such a localization of the corporation's business at Wheeling' that there was imparted 'to its entire intangible property a prima facie situs for taxation at that place.' But the court thought that the 'statutory limitation of the assessment to property "liable to taxation"' indicated that the legislature 'did not propose to tax intangibles which were primarily subject to taxation in another jurisdiction.' And referring to the above mentioned taxation in Ohio, the Supreme Court of Appeals said: 'For the purposes of this opinion, we assume that the claim of our sister state is well founded, and should be deducted from the assessment as corrected by the Tax Commissioner.' And in remanding the cause to the Circuit Court, the Supreme Court of Appeals gave opportunity to have it determined 'whether or not further deductions should be made in deference to the legal demands of other states.' In the further proceeding in the Circuit Court, it was stipulated that 'no states other than Ohio and West Virginia have assessed taxpayer upon any of its intangibles for the year 1933.'"

Then this court said the following at page 214:

"The state court permitted the deduction of the amount of the intangible property of the corporation which had been assessed in Ohio. That assessment, according to the agreed statement, was 'on accounts and notes receivable.' Counsel for the state, while insisting that the record does not show a taxable situs in Ohio of any of appellant's accounts receivable, has not taken a cross appeal or sought to assign error with respect to this part of the judgment of the Supreme Court of Appeals. The state is not in a position to complain of the deduction and no question as to its propriety is before us upon this record. Appellant urges that in Ohio 'only the excess of receivables and prepaid items over current payables' is actually taxed, and that the deduction

of 'current indebtedness' accounts for the amount of the Ohio assessment. The inference is sought to be drawn that the amount of accounts receivables taken into consideration in Ohio was thus larger than the amount assessed. We find no basis for a conclusion whether, or to what extent, deductions were allowed in Ohio."

There is no evidence in the record that the so-called Ohio receivables were taxed in 1942 by the state of Delaware and while they were taxed by the state of West Virvinia, still if they had been listed by appellant for taxation in Ohio and the tax thereon paid and the West Virginia taxing authorities had been informed thereof, the commissioner has not been able to find any reason why the credit would not be given by West Virginia in determining appellant's taxes on its receivables as of January 1, 1942, as was given as of January 1, 1933. The decision of this court in *Wheeling Steel Corporation* v. *Fox*, supra, is entirely favorable to the commissioner. It holds (1) that appellant's receivables and intangibles are subject to taxation in Delaware, even though there is in neither case any evidence that Delaware exercised its taxing power, and (2) that its receivables arising from its sales and shipments from its Ohio plants were subject to the Ohio tax and its receivables were subject to tax and were taxed in West Virginia after giving credit for Ohio taxes paid on intangibles.

The present system of taxation in Ohio became effective for the taxable year 1932 and there have been no substantial changes since then.

In the case of *Citizens National Bank of Cincinnati* v. *Durr*, 257 U. S. 99, this court held that membership in the New York Stock Exchange, when owned by a resident of Ohio, has a taxable situs in Ohio even though it

may be subject to taxation in New York. In its opinion at page 108 the court said:

> "That a membership held by a resident of the state of Ohio in the Exchange is a valuable property right, intangible in its nature, but of so substantial a character as to be a proper subject of property taxation, is too plain for discussion. That such a membership, although partaking of the nature of a personal privilege, and assignable only with qualifications, is property within the meaning of the Bankrupt Laws, has repeatedly been held by this court. * * * Whether it is subjected to taxation by the taxing laws of Ohio is a question of state law, answered in the affirmative by the court of last resort of that state, by whose decision upon this point we are controlled. * * *
>
> "The chief contention here is based upon the due process of law provision of the 14th amendment: it being insisted that the privilege of membership in the Exchange is so inseparably connected with specific real estate in New York that its taxable situs must be regarded as not within the jurisdiction of the state of Ohio. * * *"

And at page 109 this court said:

> "Nor is the plaintiff's case stronger if we assume that the membership privileges exercisable locally in New York enable that state to tax them even as against a resident of Ohio. * * * Exemption from double taxation by one and the same state is not guaranteed by the 14th amendment. * * * much less is taxation by two states upon identical or closely related property interests falling within the jurisdiction of both forbidden * * *."

Appellant in its brief cites the case of *Newark Fire Insurance Company* v. *State Board of Tax Appeals*, 307 U. S. 313. In that case this court held that a tax levied by the state of New Jersey upon the paid-up capital stock and accumulated surplus of a New Jersey fire insurance

company whose executive and general business offices at which its accounts are kept and its general affairs conducted are in New York and whose cash and securities are located there or in banks, only a small amount being deposited in New Jersey banks, was held not to violate the due process clause of the Fourteenth Amendment, even though the intangibles of the corporation had acquired a taxable situs outside of New Jersey. In a separate opinion announced by Mr. Justice Frankfurter, in which Mr. Justice Stone, Mr. Justice Black and Mr. Justice Douglas concurred, it is stated on page 324:

> "* * * it is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the constitution our task is ended."

The appellant in its brief cites the case of *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1. In that case this court held that the mere fact that a debtor is domiciled in South Carolina does not give said state jurisdiction to impose an inheritance or succession tax upon the transfer of the debt by a decedent who was domiciled in another state. The court in its opinion at page 8 said:

> "It is sought to sustain the tax by South Carolina upon the ground that the indebtedness had what is called a 'business situs' in that state, and the state court adverted to this basis for the tax. In Farmers Loan & T. Co. v. Minnesota, 280 U. S. 204, 74 L. ed. 371, 65 A. L. R. 1000, 50 S. Ct. 98, supra, this court reserved the question of business situs, saying: 'New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 S. Ct. 110, Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 S. Ct. 585, Liverpool & L. & G. Ins. v. Board of Assessors, 221 U. S. 346, 55 L. ed. 762, L. R. A. 1915C, 903, 31 S. Ct. 550, recognize the principle that choses in action may acquire a situs

for taxation other than at the domicile of their owner if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile.' But a conclusion that debts have thus acquired a business situs must have evidence to support it, and it is our province to inquire whether there is such evidence when the inquiry is essential to the enforcement of a right suitably asserted under the Federal Constitution."

The appellant also cites in its brief the case of *Curry* v. *McCanless*, 307 U. S. 357, in which intangibles of a trust created in Alabama and owning and holding such stocks and bonds in Alabama by a decedent domiciled in Tennessee was held to have two tax situses for inheritance tax purposes and this court specifically said (pp. 372 and 373):

"We can find nothing in the history of the Fourteenth Amendment and no support in reason, principle, or authority for saying that it prohibits either state, in the circumstances of this case, from laying the tax. On the contrary this court, in sustaining the tax at the place of domicile in a case like the present, has declared that both the decedent's domicile and that of the trustee are free to tax. . . . That has remained the law of this court until the present moment, and we see no reason for discarding it now. We find it impossible to say that taxation of intangibles can be reduced in every case to the mere mechanical operation of locating at a single place, and there taxing, every legal interest growing out of all the complex legal relationships which may be entered into between persons. . . ."

The appellant also cites the case of *Wisconsin* v. *J. C. Penney Company*, 311 U. S. 435, in which this court held that a Wisconsin state tax on the privilege of declaring

and receiving dividends out of income derived from property located and business transacted in the state is not, as applied to a foreign corporation licensed to do business in this state, a violation of the due process clause. This court in its opinion at page 446 said:

> "* * * Here, on the contrary, the incidence of the tax as well as its measure is tied to the earnings which the state of Wisconsin has made possible, in so far as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes. * * *"

In the case of *Parke, Davis and Co.* vs *Atlanta*, 200 Ga. 296, it was said in the first and fourth branches of the syllabus:

> "(1) Where a foreign corporation kept a stock of goods in a warehouse in the city of Atlanta, Georgia, orders were received and approved outside the State, which were filled by delivering goods from the warehouse to resident purchasers and to common carriers for delivery to non-resident purchasers, accounts receivable thereon arise out of business conducted in the City of Atlanta, and would have a taxable situs for ad valorem taxation by said municipality, notwithstanding that the orders taken by non-resident owner for the merchandise sold in the municipality are passed upon as to the credit of customers, and the books of account are kept at a point without the City of Atlanta and the State of Georgia."
>
> "(4) Where a non-resident corporation became the owner of accounts receivable arising out of business conducted in a municipality in this state, such credits had a tax situs in the municipality where such business was conducted, so that the enforcement of a tax upon the credits *would not be contrary to the guaranty of the due process or equal protection of the law as expressed in the fourteenth amendment of the Constitution of the United States,* or paragraphs 2 and 3 of section 1 in article I of the

Constitution of Georgia, notwithstanding that the credit of the customers may have been passed upon and the books of account kept by the corporation at a point without the State." (Emphasis added.)

As stated in *Southern Pacific Company* v. *McColgan*, 68 Calif. App. (2d) 48 (1945), at page 70:

"* * * In other words, when the *mobilia* rule was not in accord with the realities of the situation it was either disregarded or held not to preclude another state which had become definitely connected with these intangibles from taxing them or their income. This concept that another state than the state of legal domicile had jurisdiction to tax intangibles was enunciated in a series of cases holding that where the intangibles had acquired a 'business situs' in a foreign state, that state could tax. (Citing cases.)"

And at page 71 it is stated:

"* * * At any rate we do know, under the rule of the cases heretofore cited, that the fact that double taxation of the intangibles might result is not necessarily a constitutional bar to both states imposing a tax on the same intangibles."

The appellee, the commissioner, contends that the Ohio statutes as interpreted and applied are not in violation of the due process clause of the Fourteenth Amendment as:

(1) The tax imposed is assessed against a foreign corporation, licensed to do business in Ohio and subject to taxation in Ohio, and is an ad valorem tax on the value of credits.

(2) Credits include notes and accounts, due on demand or within one year from the date of inception thereof, and prepaid items, less notes and accounts payable due on demand or within one year after the inception thereof.

(3) The tax rate of three mills on the dollar of value of such credits is applied to credits having a situs in Ohio as defined by the Ohio statutes whether such credits belong to a non-resident or a resident.

(4) The proceeds of such tax, in the case of a corporation filing an inter county consolidated personal property tax return, as appellant did for the year 1942, which is herein involved, went into the general revenue fund of the state of Ohio.

(5) Ohio conferred numerous benefits and protections upon appellant and its credits upon which the tax in dispute herein was assessed, in view of the facts that the receivables included in said credits arose from sales consummated at appellant's plants in Ohio, that the greater part of appellant's manufacturing plants were situated in Ohio, that most of appellant's inventories were maintained in Ohio, that appellant maintained a sales office in Ohio, that appellant's subsidiaries maintained two sales offices in Ohio, that appellant and its subsidiaries had tangible personal property in thirteen different Ohio counties, that appellant maintained bank accounts in Ohio, and that payroll checks were both drawn and issued in Ohio and delivered in Ohio, that appellant was authorized to and did transact business in Ohio, that appellant manufactured a large part of its products in Ohio and that it maintained large inventories of raw, semi-finished and finished goods in Ohio as of tax listing day, January 1, 1942, and prior thereto.

(6) The credits arose from business and contracts consummated in Ohio

(7) The credits had a business situs in Ohio.

(8) Credits may have more than one situs for purpose of taxation. See *Curry* v. *McCanless*, supra; *Newark Fire Insurance Company* v. *State Board of Tax Appeals*,

supra; *State Tax Commission* v. *Aldrich*, 316 U. S. 174; *Cream of Wheat* v. *County of Grand Forks*, 253 U. S. 325; *Citizens National Bank of Cincinnati* v. *Durr*, supra; *Wheeling Steel Corporation* v. *Fox*, supra.

(9) The physical evidence of the credits or receivables does not have to be present in the state claiming to be the business situs of the credits or receivables on which the tax is imposed. See *Metropolitan Life Insurance Company* v. *New Orleans*, 205 U. S. 395; *Liverpool & L. & G. Insurance Company* v. *Orleans Assessors*, 221 U. S. 346; *Newark Fire Insurance Company* v. *State Board*, 307 U. S. 313; *Parke, Davis and Co.* v. *Atlanta*, supra; *Colgate-Palmolive-Peet Company* v. *Davis*, 196 Ga. 681 (1943); *Southern Pacific Company* v. *McColgan*, supra.

(10) The credits taxed and the avails thereof were used in appellant's business in Ohio and elsewhere.

(b) The Statutes in Question Are Constitutional Under the Commerce Clause.

This is an Ohio ad valorem intangible property tax upon credits including accounts receivable resulting from the sale by appellant of its products manufactured or manufactured and stored in Ohio and prepaid insurance premiums. It is an ad valorem tax on property having a situs in Ohio. It is not a tax upon gross receipts, income or the privilege of doing business. It is difficult to see how when an ad valorem tax assessed against appellant, a foreign corporation licensed to transact business in Ohio and having the greater part of its tangible personal property in Ohio and when the tax at the rate of three mills per dollar of valuation is uniformly applied on all credits having a situs in Ohio, the commerce clause is offended.

The record does not disclose what part, if any, of appellant's products manufactured and delivered from its plants in Ohio was shipped outside of the state of Ohio. See *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250.

Further, it is not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burdens, even though their just share of such burdens increases the cost of doing interstate business. See *Western Live Stock* v. *Bureau of Revenue*, supra.

In this court's opinion in *Western Live Stock* v. *Bureau of Revenue*, supra, at page 259, the court said:

> "* * * Recognizing that not every local law that affects commerce is a regulation of it in a constitutional sense, this court has held that local taxes may be laid on property used in the commerce; that its value for taxation may include the augmentation attributable to the commerce in which it is employed; and, finally, that the equivalent of that value may be computed by a measure related to gross receipts when a tax of the latter is substituted for a tax of the former. * * *."

In its brief appellant relies upon a decision by this court in the case of *J. D. Adams Manufacturing Company* v. *Storen*, 304 U. S. 307, in which this court held that an Indiana gross receipts tax of 1% violated the commerce-clause as it lays a tax on all gross receipts of an Indiana corporation selling 80% of its products in interstate commerce and such tax is not apportioned by the statute imposing it. In its brief appellant also cites the case of *Gwin, White & Prince, Inc.*, v. *Henneford*, 305 U. S. 434, in which this court held that a Washington state tax imposed for the privilege of engaging in business activities measured by gross receipts upon a domes-

tic corporation whose only activities consisted of acting as the representative of growers in the state and marketing in other states fruits grown in the taxing state is unconstitutional and in violation of the commerce clause. It is difficult to see any similarity between the *J. D. Adams Manufacturing Company* case and the *Gwin, White & Prince, Inc.*, case and the instant case.

In *Memphis Natural Gas Company* v. *Stone*, 335 U. S. 80, this court held that a Mississippi franchise tax measured by the value of capital used, invested or employed within the state was not an unconstitutional burden on interstate commerce in the case of an interstate natural gas pipeline company, a portion of whose line passed through the state but which did no local business therein. In the opinion handed down by Mr. Justice Reed with the concurrence of Mr. Justice Murphy and Mr. Justice Douglas who were in the majority, it was said "that the burden imposed on interstate commerce was no more unreasonable than the concededly permissible ad valorem taxation of the company's property within the state."

Mr. Justice Frankfurter in his dissenting opinion, in which Mr. Justice Vincent and Mr. Justice Burton concurred, said "that the pipeline company received from the state no protection, opportunities or benefits other than those for which it paid ad valorem taxes."

An ad valorem tax is not an unconstitutional burden on interstate commerce when it is levied against a foreign corporation on its receivables having a business situs within the levying state. See *Citizens National Bank* v. *Durr*, supra; *Virginia* v. *Imperial Coal Sales Company*, 293 U. S. 15; *Parke, Davis and Co.* v. *Atlanta*, supra; *Colgate-Palmolive-Peet Company* v. *Davis*, supra.

In the case of *Parke, Davis and Co.* v. *Atlanta*, supra; the third branch of the syllabus reads as follows:

> "If, under the facts of the case, a tax situs did exist in the municipality seeking to tax the accounts receivable, it would be immaterial whether they arose in interstate commerce, since the commerce clause (U. S. Const. art. I, sec. 8., cl. 3) does not exempt either tangible or intangible property from a non-discriminatory ad valorem tax by a municipality. Hence there would be no burden upon interstate commerce for the accounts receivable to be taxed as sought by the municipality, under the facts stated in the petition."

Parke, Davis and Company is a Michigan corporation engaged in a foreign commerce and commerce among the states manufacturing its goods in the state of Michigan and selling such goods abroad and to all the states of the United States. See *Parke, Davis and Co.* v. *Cook*, 198 Ga. 457.

In the case of *Colgate-Palmolive-Peet Company* v. *Davis*, supra, in its opinion at page 685 the court said:

> "* * * If under the facts of the case a tax situs did exist in Georgia (and we hold that it did) as to the credits sought to be taxed, it would be immaterial whether they arose in interstate commerce, since the commerce clause does not exempt either tangible or intangible property from a non-discriminatory tax by a state. Suttles v. Northwestern Mutual Life Insurance Co., supra (193 Ga. 495); Virginia v. Imperial Coal Sales Co., 293 U. S. 15. * * *"

Colgate-Palmolive-Peet Company is a Delaware corporation with its principal office at Jersey City, New Jersey, and the purchase orders, from which its said receivables arose, were sent from its sales office or offices in Georgia to its Jefferson, Indiana, office to be approved and filled.

In the case of *General Trading Company* v. *State Tax Commission*, 322 U. S. 335, this court, in its majority opinion handed down by Mr. Justice Frankfurter, at page 338 said:

> "* * * Of course, no state can tax the privilege of doing interstate business. See Western Live Stock v. Bureau, 303 US 250, 82 L ed 823, 58 S Ct 546, 115 ALR 944. That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a state to the upkeep of which he may be asked to bear his fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. See Best & Co. v. Maxwell, 311 US 454, 85 L ed 275, 61 S Ct 334."

The commissioner urges that, in view of the facts in the instant case and the decisions of this court, there is in this case no violation of the commerce clause.

(c) The Statutes in Question Are Not Invalid Under the Equal Protection Clause of the Fourteenth Amendment.

The statutory provisions which, as construed and applied, imposed the tax here complained of, having been construed in a number of cases by the Supreme Court of Ohio. The pertinent statutes are Section 5325-1, General Code of Ohio, Section 5328-1, General Code of Ohio, and Section 5328-2, General Code of Ohio. The Ohio Supreme Court has construed and applied said statutes in cases where ad valorem taxes were assessed against corporations and franchise taxes were assessed against

corporations. Such decisions are discussed earlier in this brief under the heading of "The Decisions of the Supreme Court of Ohio." The apparent purpose of said three sections is to make one of two factors sufficient for taxation of receivables when arising out of business when such receivables or the avails thereof are used in business. We are here concerned with only the following (1) a sale of property by an agent or (2) a sale from a stock of goods, in testing the soundness of appellant's argument that said section so operates as to discriminate against it.

As applied to a domestic corporation either of the aforementioned factors is claimed by appellant to be sufficient to cause accounts receivable to arise out of business transacted in a foreign state. Hence, having a taxable situs in a state other than Ohio, such receivables would be exempt from taxation in this state. Applying the statute conversely and to a foreign corporation either of these two factors is sufficient to establish that receivables shall be considered as arising out of business transacted in this state. It is evident, therefore, that it was the legislative intent to treat domestic corporations and foreign corporations on an equal basis —either of two factors would be sufficient to make such receivables arise out of business transacted in a foreign state or arise out of business transacted in this state. It is felt, therefore, that *on its face* it can not be said that said section is discriminatory. A statute, for example, which specifically provided for a tax at one rate as to domestic corporations and for a tax at a higher rate as to foreign corporations would probably be one which *on its face*, and entirely independent of any operative facts, would be discriminatory. That is not the situation here.

A domestic corporation carrying on all of its business activities in this state and making sales from a stock of goods maintained herein, with receivables resulting therefrom, would clearly be subject to the provisions of Section 5328-2, General Code of Ohio, in that said receivables would arise out of business transacted in this state. Its receivables would have an Ohio situs under the sections of the General Code of Ohio here under consideration. Similarly, a foreign corporation whose receivables resulted from a sale from a stock of goods maintained in this state would also be subject to having said receivables considered as arising out of business transacted in this state. The section would operate with equal force against either corporation. It could hardly be said that under such circumstances there would be any discrimination.

It will have to be recognized that there is some force to the argument that Section 5328-2, General Code of Ohio, is susceptible of an interpretation that perhaps could result in discrimination in that a domestic corporation would be favored over a foreign corporation. Appellant's argument in support of such claim appears at pages 22 to 26, both inclusive, of its brief, to wit:

> "In the *Ransom & Randolph* case the court decided that Section 5328-2 fixes the tax situs of accounts receivable and that the receivables of an Ohio resident are exempt from property taxes in Ohio when (a) arising out of business transacted in another state and (b) used in business, whether in the foreign state or elsewhere. In other words, a resident's receivables need not *be used in* business in a foreign state to qualify for tax exemption: all that is necessary is that the receivables arise out of business in the foreign state and be used in business anywhere. Specifically, the court said in its opinion (p. 408) that:

'The only statutory conditions for out of state situs of accounts receivable are that they shall be used in business and shall result from sale of property sold by an agent having office in such other state or from a stock of goods maintained therein.'

"In the present case, the board decided (R. 70, 71, 72) that the accounts receivable of a non-resident are taxable in Ohio when (a) arising out of business transacted in Ohio and (b) used in business anywhere, and the court affirmed the board's decision (R. 22).

"Thus the 'business situs' of accounts receivable is determined solely by the place where they 'arise out of business' as defined by Sections 5328-2 which, as construed and applied, means one thing in the case of a foreign corporation, another thing entirely in the case of a domestic corporation. Specifically, in the case of an Ohio resident *no significance is attached to what is done in Ohio.* The fact that a stock of goods is maintained in Ohio is immaterial if the goods are sold by an agent having an office in another state. Receivables resulting from the sale are exempt from taxation in Ohio because of what is done outside of the state and what is done in Ohio is disregarded. Likewise, it is immaterial that sales are made by an agent having an office in Ohio if the sales are made from a stock of goods outside of the state. The fact that the stock of goods, from which the sales are made, is outside of Ohio is controlling and receivables resulting from the sales are exempt from taxation in Ohio notwithstanding that the sales are made in the state. In the case of a non-resident, however, *only what is done in Ohio is material.* The fact that sales are made by an agent having an office in another state is of no significance if the sales are made from a stock of goods in Ohio. Receivables resulting from the sales are taxable in Ohio because the sales are made there and the fact that the stock of goods is located in another state is of no consequence. So also, where sales are made by an agent having an office in another state from a

stock of goods maintained in Ohio, receivables resulting from the sales are taxable in Ohio because of the location of the stock of goods in the state. The fact that the sales are made outside of Ohio is immaterial.

"In other words, Sections 5328-1 and 5328-2 require that accounts receivable of a resident, when and wherever used in business, be exempted from taxation in Ohio:

"(a) if resulting from the sale of property sold by an agent having an office in a state other than Ohio, or

"(b) if resulting from the sale of property from a stock of goods maintained in a state other than Ohio;

and (2) that accounts receivable of a non-resident, when and wherever used in business, be taxed in Ohio:

"(a) if resulting from the sale of property sold by an agent having an office in Ohio, or

"(b) if resulting from the sale of property from a stock of goods maintained in Ohio.

"So construed, a resident of Ohio may maintain a stock of goods in Ohio and sell them through an agent having an office in another state, or he may maintain the stock of goods in another state and sell them through an agent having an office in Ohio and in either case all receivables resulting from the sales are exempted from taxation in Ohio by Sections 5328-1 and 5328-2. On the other hand, if a non-resident does business in exactly the same manner as the resident, maintaining a stock of goods in Ohio and selling the goods through an agent having an office in another state, or maintaining the stock of goods in another state and selling them through an agent having an office in Ohio, then, in either case, all of the receivables resulting from the non-resident's sales are taxable in Ohio under Sections 5328-1 and 5328-2. These instances are not unique as it is ordinary practice for businesses to have a stock of goods in one state and to sell them in another at a sales office maintained for that pur-

pose. Thus, accounts receivable arising out of one business are taxed in Ohio because the owner is a non-resident, while receivables arising out of a competing business, conducted in exactly the same manner as the other, are exempted from taxation in Ohio because the owner is a resident of the state.

"Pursuant to this construction of the statutes, all of appellant's receivables resulting from sales of steel and steel products manufactured in its Ohio plants were assessed for taxation in Ohio on the ground that they resulted from the sale of property from a stock of goods maintained in Ohio (R. 22, 58, 72). Appellant vigorously opposed this conclusion in view of the stipulation (R. 63) that:

> '11. Products shipped from appellant's Ohio manufacturing plants to fill the orders from which resulted the greater part, in dollar value, of the notes and accounts receivable owned by appellant and its subsidiaries on tax-listing day in 1942 were manufactured at said plants after receipt of, and to fill specific orders therefor and had not been manufactured prior to the receipt of orders and kept on hand to fill orders. A smaller part, in dollar value, of said notes and accounts receivable resulted from sales of products which had been manufactured prior to the receipt of orders therefor and kept on hand at said plants to fill any orders therefor that appellant might receive.'

"Assuming, however, that appellant did maintain a stock of goods in Ohio, it nevertheless sold the goods by taking orders for them at sales offices in eleven states outside of Ohio subject to acceptance at its principal office in Wheeling, West Virginia where all of the sales were concluded. Therefore, had appellant been an Ohio corporation, all of the receivables in question would have been exempted from taxation in Ohio by Section 5328-2 on the ground that they resulted from sales of property sold by an agent having an office in another state.

"This is the discrimination of which appellant complains. Its receivables were assessed for taxa-

tion only because it is a foreign corporation. Receivables of competing domestic corporations doing business in exactly the same manner as appellant are not subject to taxation in Ohio. Thus appellant's receivables are subject to taxation in Ohio while identical property of local enterprises is exempt from taxation."

This court approved of the decision of the Supreme Court of West Virginia in the case of *In re Wheeling Steel Corporation Assessment*, 115 W. Va. 553 (1934), wherein it was said at page 557:

"On the other hand, the Federal Court cautions against an assessment 'intrinsically arbitrary' of a unitary corporation enterprise which is conducted in several states, and warns that an apportionment of its intangible property among such states for purposes of taxation may be requisite. See Hans Rees' Sons Inc. vs. North Carolina, 283 U. S. 123, 75 L. Ed. 879. The statutory limitation of the assessment to property 'liable to taxation' indicates that the legislature had this contingency in mind and did not propose to tax intangibles which were primarily subject to taxation in another jurisdiction."

In the case of *The Ransom & Randolph Company, Appellant,* v. *Evatt, Tax Commissioner, Appellee,* supra, the court in its opinion handed down by Judge Turner, at page 409, said the following in respect to said statutes:

"It is clear that it was the intention of the General Assembly that all property having a business situs in Ohio should be taxed in Ohio and that no property having a business situs outside of Ohio should be so taxed."

The Ohio statutes are intended (1) not to tax accounts receivable, used in and arising out of business, whether of a foreign or domestic corporation, having a situs out-

side of Ohio; (2) to tax accounts receivable of a domestic corporation unless such receivables have a situs outside of Ohio; and (3) to tax accounts receivable of a foreign corporation if they have a situs within Ohio. All such receivables having a situs outside of Ohio are presumably subject to tax in another state.

The Ohio Supreme Court has construed and applied the pertinent Ohio statutes in cases in which the orders were accepted outside of Ohio by an Ohio corporation and delivery was made from a stock of goods maintained by said Ohio corporation at the place outside of Ohio where such orders were accepted and in such cases has held that the situs of the receivables arising from such sales is outside of Ohio and not subject to the ad valorem tax. See *Ransom & Randolph* v. *Evatt*, supra; and *The Haverfield Company* v. *Evatt*, supra.

However, the Ohio Supreme Court has not construed and applied such statutes in any case involving said ad valorem tax upon receivables arising where an Ohio corporation accepted outside Ohio an order for sale and filled such order from a stock of goods maintained within Ohio. Appellant complains that the Ohio statutes have been so construed and applied and that the construction which it assumes to have been made and to have exempted such receivables from the Ohio ad valorem tax is discriminatory as against appellant, a foreign corporation, because appellant has been held subject to such tax on its receivables arising from orders accepted outside Ohio by it when such orders were filled by it in Ohio from goods on hand in Ohio.

It is difficult to see how there has been any discrimination by the Ohio Supreme Court in construing and applying such statutes.

In the case of *Fidelity & Columbia Trust Company* v. *City of Louisville*, 245 U. S. 54, this court in its opinion handed down by Mr. Justice Holmes at pages 59 and 60 said:

> "* * * It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. Flint v. Stone Tracy Co., 220 U. S. 107, 146, 162, et seq., 55 L. ed. 389, 411, 417, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312. Whichever this tax technically may be, the authorities show that it must be sustained.
>
> "It is said that the plaintiff in error has been denied the equal protection of the laws because, if the argument is correct, which we have not considered, the decision in this case is inconsistent with earlier decisions of the Kentucky court. But with the consistency or inconsistency of the Kentucky cases we have nothing to do. Lombard v. West Chicago Park, 181 U. S. 33, 44, 45, 45 L. ed. 731, 738, 21 Sup. Ct. Rep. 507. We presume that, like other appellate courts, the Kentucky court of appeals is free to depart from precedents if, on further reflection, it thinks them wrong."

In the case of *Citizens National Bank* v. *Durr*, supra, this court in its majority opinion at pages 109 and 110 said:

> "That plaintiff is denied the equal protection of the laws, within the meaning of the 14th Amendment, cannot be successfully maintained upon the record before us. The argument is that other brokers in the same city are not taxed upon the value of their memberships in the local stock exchange, nor upon the privilege of doing business in New York Stock Exchange securities. As to the local exchange memberships, it may be that the failure to tax them is but accidental or due to some negligence of subordinate officers, and is not prop-

erly to be regarded as the act of the state. If it be state action, there is a presumption that some fair reason exists to support the exemption, not applicable to a membership in the New York Exchange, and plaintiff has shown nothing to overcome the presumption. As to the privilege referred to, it already has been shown that the rights incident to plaintiff's property interest give him pecuniary advantages over others in the same business. Manifestly this furnishes a reasonable ground for taxing him upon the property right, although others enjoying lesser privileges because of not having it may remain untaxed."

CONCLUSION.

From the foregoing, it is apparent that the Ohio statutes, as construed and applied, do not offend or violate the commerce clause of the Federal Constitution and do not offend or violate the due process clause or the equal protection clause of the Fourteenth Amendment to the Federal Constitution. It follows that the state of Ohio having the power to tax the credits in question, the assessment should be sustained.

Respectfully submitted,

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APPENDIX.

Ohio Statutes.

Section 5325-1. *Application of term "used in business"; definition of word "business."* Within the meaning of the term "used in business," occurring in this title, personal property shall be considered to be "used" when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a non-resident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be "used" when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. "Business" includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations.

Section 5328. *All taxable property to be entered on general tax list and duplicate.* All real property in this state shall be subject to taxation, except only such as may be expressly exempted therefrom. All personal property located and used in business in this state and all domestic animals kept in this state, whether used in business or not shall be subject to taxation, regardless

of the residence of the owners thereof. All ships, vessels and boats, and shares and interests therein, defined in this title as "personal property," belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, shall be subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property as prescribed in this title.

Section 5328-1. *Property to be entered on classification tax list and duplicate; exemption.* All moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title; but the good will of a business shall not be considered to be property separate from the other property used in or growing out of such business. Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons, and non-withdrawable shares of stock of financial institutions located outside of this state, belonging to persons residing in this state, shall not be subject to taxation. Such property, subject to taxation, shall be entered on the classified tax list and duplicate of taxable property or on the in-

tangible property tax list in the office of the auditor of state and duplicate thereof in the office of the treasurer of state, as prescribed in this title.

A corporation shall not be required to list any of its investments in the stocks of any other corporation or in its own treasury stock.

Section 5328-2. *Fixing situs of certain classes of property within or without this state; application to be reciprocal; effect of provisions held invalid.* Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state.

In the case of prepaid items, when the right acquired thereby relates exclusively to the business to be transacted in such other state, or to property used in such business.

In the case of accounts payable, the proportion of the entire amount of accounts receivable, wherever arising, represented by those arising out of business transacted in such other state ascertained as herein provided shall be taken to represent the proportion of the entire amount of accounts payable arising out of the business transacted in such other state.

In the case of deposits (other than such as are used in business outside of such other state), when withdrawable in the course of such business by an officer or agent

having an office in such other state; but deposits representing general reserves or balances of the owner thereof, maintained for the purpose of his entire business wherever transacted, shall be considered located in the state wherein the owner resides, if an individual, or wherein its actual principal executive office is situated, if a partnership or association, or under whose laws it is organized, if a corporation, by whomsoever they may be withdrawable.

In the case of moneys, when kept on hand at an office or place of business in such other state.

In the case of investments not held in trust, when made, created or acquired in the course of repeated transactions of the same kind, conducted from an office of the owner in such other state, and (1) representing obligations of persons residing in such other state or secured by property located therein, or (2) when an officer or agent of the owner at the owner's office in such other state, has authority in the course of the owner's business, to receive or collect the income thereon or the principal, if any, or both when due, or to sell and dispose of the same.

The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this

state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a non-resident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof.

Section 5638-1. *Rates of taxation.* Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of treasurer of state at the following rates, to-wit:

Investments, six per centum of income yield for the year 1935 and five per centum of income yield thereafter; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; shares in and capital employed by dealers in intangibles, five mills on the dollar; and moneys, credits and all other taxable intangibles, so listed, three mills on the dollar.

The object of such taxes levied on such property so listed are those declared in section 5414-19 of the General Code to which only the same shall be applied.

Section 5414-19. *Taxes collected for use of general revenue fund.* The taxes levied by section 5414-9 and section 5638-1 of the General Code and collected under the provisions of this chapter shall be for the use of the general revenue fund of the state and shall be paid into the state treasury.

Section 5327. *"Credits", "current accounts" and "prepaid items" defined; what not included.* The term

"credits" as so used, means the excess of the sum of all current accounts receivable and prepaid items [used] in business when added together estimating every such account and item at its true value in money, over and above the sum of current accounts payable of the business, other than taxes and assessments. "Current accounts" includes items receivable or payable on demand or within one year from the date of inception, however evidenced. "Prepaid items" does not include tangible property. In making up the sum of such current accounts payable there shall not be taken into account an acknowledgment of indebtedness, unless founded on some consideration actually received, and believed at the time of making such acknowledgment to be a full consideration therefor; nor an acknowledgment for the purpose of diminishing the amount of credits to be listed for taxation.

Section 5625-3. *Authorized to levy taxes.* The taxing authority of each subdivision is hereby authorized to levy taxes annually, subject to the limitation and restrictions of this act, on the real and personal property within the subdivision for the purpose of paying the current operating expenses of the subdivision and the acquisition or construction of permanent improvements. The taxing authority of each subdivision and taxing unit shall, subject to the limitations and restrictions of this act, levy such taxes annually as are necessary to pay the interest and sinking fund on and retire at maturity the bonds, notes and certificates of indebtedness of such subdivision and taxing unit including levies in anticipation of which the subdivision or taxing unit has incurred indebtedness. All taxes levied on property shall be extended on the tax duplicate by the county auditor

of the county in which the property is located, and shall be collected by the county treasurer of such county in the same manner and under the same laws, rules and regulations as are prescribed for the assessment and collection of county taxes. The proceeds of any tax levied by or for any subdivision when received by the fiscal officer thereof shall be deposited in its treasury to the credit of the appropriate fund.

Section 5379. *Corporation may make consolidated return; property, how listed and assessed; inter-company accounts eliminated; joint return.* A corporation which owns or controls at least fifty-one per centum of the common stock of another corporation or corporations may, under uniform regulations to be prescribed by the commission, make a consolidated return or returns for the purpose of this chapter. In such case all the taxable property mentioned in section 5328 of the General Code, belonging to the corporation making the return and to each of its subsidiaries shall be listed and assessed in the name of the separate owners thereof, respectively; but the parent corporation making such return, shall not be required to list any of its investments in the stocks, securities and other obligations of its subsidiaries, and in computing the amount of taxable credits, inter-company accounts shall be eliminated.

A husband and wife living together may under uniform regulations to be prescribed by the commission make a joint return for the purpose of this chapter. In such case investments of either spouse in the obligations of the other shall not be required to be listed therein, and in computing the amount of taxable credits such obligations shall be eliminated.